UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE TULALIP TRIBES; and THE SUQUAMISH TRIBE, Plaintiffs, v. HON. JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; ADMIRAL PAUL F. ZUKUNFT, in his official capacity as Commandant of the U.S. Coast Guard; REAR ADMIRAL MARK E. BUTT, in his official capacity as Commander of the Thirteenth Coast Guard District; and the U.S. COAST GUARD, Defendants.	Case No. ______________________ COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This suit challenges the failure of the U.S. Coast Guard to protect the critically imperiled Southern Resident Killer Whale and other threatened marine species in the inland waters of the Salish Sea from the significant risk of oil spills and other harms associated with shipping traffic, particularly oil tankers.

2. The Salish Sea is a network of coastal waterways that includes the northwestern

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portion of waters off the coast of Washington State, including Georgia Strait, the Strait of Juan de Fuca, and Puget Sound, and waters in this area north of the international border in Canada.

3. The Southern Resident Killer Whale is critically endangered, with only 78 remaining individuals. Its designated critical habitat includes most of the waters of the Salish Sea. The risk of an oil spill and other harms from large vessel traffic in these waters are among the primary threats to these whales and their critical habitat.

4. These threats have recently become even more pronounced with the Canadian government's November 2016 approval of Kinder Morgan's application to expand the TransMountain pipeline in Canada. The TransMountain pipeline will triple the amount of oil coming from the Alberta tar sands to marine oil tankers departing from Burnaby, British Columbia, resulting in a seven-fold increase in oil tanker traffic moving through the San Juan Islands and the Strait of Juan de Fuca in Washington State. Southern Resident Killer Whales spend approximately half of the year in these same waters, hunting Chinook salmon. A major oil spill in these waters is an existential threat to this fragile whale population.

5. The U.S. Coast Guard, which has primary responsibility for regulating commercial shipping in the habitat of these marine species, has a statutory obligation under the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2), to insure that large vessel traffic does not jeopardize the continued existence of these species. By failing to consult with the expert agency, the National Marine Fisheries Service ("NMFS"), regarding the potential impacts of the shipping traffic it regulates, the Coast Guard is violating the ESA, and is also acting in a manner that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of the Administrative Procedure Act ("APA"). 5 U.S.C. § 706.

6. Plaintiffs seek a judgment declaring that the Coast Guard's adoption of traffic separation schemes that regulate commercial shipping traffic in the absence of a completed consultation with NMFS violates section 7(a)(2) of the ESA. Plaintiffs also seek an order

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requiring the Coast Guard to comply with the ESA and to avoid or remediate harm to listed species until such time as consultation is complete and the Coast Guard has implemented the permanent measures necessary to ensure against jeopardy, prevent adverse modification of critical habitat, and minimize incidental take.

PARTIES

7. The Tulalip Tribes and the Suquamish Tribe rely on land and resources in the Salish Sea and along its shorelines for traditional, commercial, economic, and cultural purposes. Since time immemorial, the Tribes have lived, fished, hunted, and gathered in this area. Salmon and shellfish play a central role in the Tribes' subsistence, economy, culture, spiritual life, and day-to-day existence. These treaty-reserved resources and the ability to continue traditional activities require a healthy ecosystem in the Salish Sea on both sides of the U.S.-Canada border. The Tribes are part of the Coast Salish people, whose political, social, and economic linkages spanned the international border long before the border existed.

8. Although they are separate, distinct nations, the Tribes share a common legal history. In a series of treaties with the U.S. government in 1854 and 1855, the Indian tribes of what is now Puget Sound and the Washington State coast ceded their aboriginal lands to the United States and retained or reserved certain lands, sovereignty, as well as fishing rights in their usual and accustomed places, and hunting and gathering rights on open and unclaimed lands. A treaty in the United States is not a grant of rights to Indians but a grant of rights from them, and those rights not specifically granted are reserved to the Indians. *U.S. v. Winans*, 198 U.S. 371, 380-81 (1905). The treaties here are collectively known as the Stevens Treaties, after the U.S. negotiator and Washington Territorial Governor Isaac Stevens.

9. Plaintiff Tulalip Tribes is the successor-in-interest to the Snohomish, Snoqualmie, Skykomish, and other allied tribes and bands who signed the 1855 Treaty of Point Elliott and who collectively agreed to cede their ancestral lands and relocate their tribal homes on the

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Tulalip Federal Reserve. The Tulalip tribal population is about 4,300 and growing, with 2,600 members residing on the 22,000 acre Tulalip Indian Reservation located north of Everett, Washington on the mouth of the Snohomish River and west of Marysville, Washington. The reservation includes 16 miles of marine shoreline along the Salish Sea, reflecting the Tribes' heritage and culture as a marine tribe. The Tribes also maintain an aggressive environmental preservation program, both on and off of the reservation to complement the Snohomish region's natural resources. The Tulalip people have a relationship with the killer whale that goes back to time immemorial. The killer whale plays an important part in Tulalip oral history, and the early stories tell of the killer whale saving Tulalip people from starvation. The killer whale is held in high honor and respect and is the animal that represents the Tulalip people. This action is brought by the Tulalip Tribes on its own behalf and on behalf of its members *parens patriae*. By bringing this action, the Tulalip Tribes does not waive its sovereign immunity from suit.

10. Plaintiff Suquamish Tribe is a signatory to the 1855 Treaty of Point Elliot, one of the Stevens Treaties. The Suquamish Tribe is located on the Port Madison Indian Reservation in Suquamish, Washington and is in Kitsap County. There are approximately 1,100 enrolled Suquamish Tribal members. The Suquamish Tribe is one of a few Coastal Salish Tribes who cover a vast treaty-reserved fishing territory in the Coastal Salish Sea that extends from the northern tip of Vashon Island up to the Frasier River, including the San Juan Islands, Haro and Rosario Straits, Hood Canal, and the Strait of Juan de Fuca. *See U.S. v. State of Washington*, 459 F. Supp. 1020, 1049 (1978). Since time immemorial, orcas have maintained a strong presence in the Tribe's fishing territory and are interwoven into the Tribe's treaty resource harvesting, cultural, and spiritual practices. On October 29, 2013, three dozen orcas surrounded a Washington State ferry that was transporting 500 artifacts, many up to 2,000 years old, that were taken nearly 60 years ago from Old Man House, the home of Chief Seattle. The orcas surrounded the ferry as it pulled into the ferry terminal on Bainbridge Island when these artifacts

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were being returned to the Suquamish Museum after being temporarily held at the Burke Museum at the University of Washington. The Suquamish people believes the orcas were welcoming the artifacts home as they made their way back to the Port Madison Indian Reservation. This action is brought by the Suquamish Tribe on its own behalf and on behalf of its members *parens patriae*. By bringing this action, the Suquamish Tribe does not waive its sovereign immunity from suit.

11. Members of the Tulalip Tribes and the Suquamish Tribe use and enjoy areas throughout the Salish Sea to exercise their treaty-reserved fishing and shellfishing rights and for spiritual, cultural, aesthetic, subsistence, and commercial purposes. The Southern Resident Killer Whales are inextricably linked to the tribes' history and to their cultural and spiritual lives and practices. Plaintiffs' members observe and interact with marine species listed under the ESA, including Southern Resident Killer Whales, as well as their marine habitats through cultural activities, wildlife observation and study, and subsistence and commercial fishing. These activities and the tribes' cultural and spiritual practices depend on viable populations of Southern Resident Killer Whales that contribute to healthy, functioning ecosystems throughout the Salish Sea.

12. The injuries to the above-described interests of the Tulalip Tribes and the Suquamish Tribe and their members are actual, concrete injuries that are presently suffered by Plaintiffs and are directly caused by the Coast Guard's failure to comply with the ESA. An order from this Court requiring the Coast Guard to comply with the procedural and substantive mandates of the ESA would protect Plaintiffs' interests in the species and redress Plaintiffs' injuries. Plaintiffs have no other adequate remedy at law.

13. Defendant John F. Kelly is sued in his official capacity as the Secretary of the Department of Homeland Security, which includes the U.S. Coast Guard. He is the chief officer in charge of the Department that has ultimate responsibility for the programs and actions of the

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Coast Guard.

14. Defendant Admiral Paul F. Zukunft is sued in his official capacity as the Commandant of the Coast Guard. He is the Coast Guard's top service official, responsible for all worldwide Coast Guard activities. As Commandant, he is responsible for ensuring that the Coast Guard, including officials and employees under his supervision, comply with all applicable federal laws, including the ESA.

15. Defendant Rear Admiral Mark E. Butt is sued in his official capacity as the Commander of the Thirteenth Coast Guard District, the district that oversees the protection of the waters in the Pacific Northwest, including off the coast of Washington State. As Commander, he is responsible for all Coast Guard operations throughout the Pacific Northwest and ensures that the Thirteenth Coast Guard District, including officials and employees under his supervision, comply with all applicable federal laws, including the ESA.

16. Defendant U.S. Coast Guard is a federal agency of the United States government that operates under the Department of Homeland Security. The Coast Guard is responsible for establishing and modifying routing measures, traffic separation schemes, and other measures as necessary to provide safe access routes to vessels proceeding to or from U.S. ports, as well as traversing U.S. waters, pursuant to the Ports and Waterways Safety Act, 33 U.S.C. § 1221, *et seq*. As a federal agency, the Coast Guard must comply with federal law, including the ESA.

JURISDICTION AND VENUE

17. This action is brought pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(1), which provides that the "district courts shall have jurisdiction . . . to enforce any such provision or regulation" of the ESA. Jurisdiction is also conferred over this action by 28 U.S.C. § 1331 (federal question jurisdiction); § 2201 (declaratory relief); and § 2202 (injunctive relief).

18. As required under the ESA, Plaintiffs provided a 60-day notice of their intent to

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sue to the Coast Guard on February 23, 2017. A copy of this letter is appended as Exhibit A. The Coast Guard has not remedied the violations described in this 60-day notice. *See* 16 U.S.C. § 1540(g)(2)(A).

19. Venue is proper in this judicial district under 28 U.S.C. § 1391(e)(1)(C) because no real property is involved in this action, both Plaintiffs and Defendants reside or maintain offices in this district, and a substantial part of the events or omissions giving rise to the claims occurred in this district.

LEGAL BACKGROUND

I. THE ENDANGERED SPECIES ACT

20. When a species is listed as threatened or endangered under the ESA, section 7(a)(2) of the Act requires that all federal agencies "insure" that their actions "[are] not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of" their critical habitat. 16 U.S.C. § 1536(a)(2). The "institutionalized caution" embodied in the ESA requires federal agencies to give the benefit of the doubt to listed species and places the burden of risk and uncertainty on the proposed action. *Sierra Club v. Marsh*, 816 F.2d 1376, 1385 (9th Cir. 1987); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

21. The Act establishes an interagency consultation process to assist federal agencies in complying with their substantive section 7(a)(2) duty to guard against jeopardy to listed species or destruction or adverse modification of critical habitat. Under section 7(a)(2), federal agencies must consult with the appropriate expert fish and wildlife agency to determine whether their actions will jeopardize any listed species' survival or adversely modify designated critical habitat and, if so, to identify ways to modify the action to avoid that result. *See* 50 C.F.R. § 402.14. NMFS is the expert fish and wildlife agency with respect to most anadromous and marine species and the U.S. Fish and Wildlife Service ("FWS") is the expert agency with respect

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to most terrestrial and freshwater species.

22. The expert agencies have adopted joint regulations governing the section 7(a)(2) consultation process. Under the joint regulations, a federal agency must initiate a section 7(a)(2) consultation with NMFS or FWS ("the Service") whenever it undertakes an "action" that "may affect" a listed species or critical habitat. 50 C.F.R. § 402.14(a). The threshold for a "may affect" determination and the required ESA section 7(a)(2) consultation is low. *See* 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) ("Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement."). *See also* Endangered Species Act section 7 Consultation Handbook at 3-13, 4-26. An agency is relieved of the obligation to consult only if the action will have "no effect" on listed species or designated critical habitat.

23. The joint regulations broadly define the scope of agency actions subject to ESA section 7(a)(2) mandates to encompass "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by [f]ederal agencies," including the promulgation of regulations and the granting of licenses. *See* 50 C.F.R. § 402.02 (definition of "action"). Courts interpret the term "agency action" broadly under the ESA. *See, e.g.*, *Karuk Tribe of Cal. v. U.S. Forest Service*, 681 F.3d 1006, 1020 (9th Cir. 2012) (en banc).

24. Under the ESA, the "action area" is broadly defined as "all areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02. The potential "effects" of an agency action that an agency must consider are similarly broad and include both the "direct" and "indirect" effects of the action and all activities "interrelated or interdependent" with that action. *Id.*

25. In insuring that any action is not likely to jeopardize a listed species or result in the adverse modification of critical habitat, the ESA requires every agency to use only the best scientific and commercial data available at every step of the process. 16 U.S.C. § 1536(a)(2);

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50 C.F.R. § 402.14(g)(8).

26. If an agency determines that its action “may affect” but is “not likely to adversely affect” a listed species or its critical habitat, ESA regulations permit “informal consultation,” in which there is no requirement for a biological opinion so long as NMFS and/or FWS concurs in writing with the “not likely to adversely affect” determination. 50 C.F.R. § 402.13. If the Service(s) do not concur in the “not likely to adversely affect” determination or if the action agency determines that the action is “likely to adversely affect” the listed species, the agencies must engage in “formal consultation.” 50 C.F.R. §§ 402.02, 402.14(a), (b).

27. Formal consultation “is a process between the Service [either NMFS or FWS] and the [f]ederal agency that commences with the [f]ederal agency’s written request for consultation under section 7(a)(2) of the Act and concludes with the Service’s issuance of the biological opinion under section 7(b)(3) of the Act.” 50 C.F.R. § 402.02.

28. In a biological opinion, the Service must determine whether the federal action subject to the consultation will jeopardize the survival and recovery of listed species or will destroy or adversely modify critical habitat. 16 U.S.C. § 1536(b)(4). The ESA defines critical habitat as those areas with the “physical or biological features essential to the conservation of the species. . . .” 16 U.S.C. § 1532(5)(A)(i). If the Service determines that the action will jeopardize the species or destroy or adversely modify its critical habitat, the biological opinion must specify any reasonable and prudent alternative (RPA) the action agency could take to avoid jeopardy or specify that there is no RPA. 16 U.S.C. § 1536(b)(4)(A); 50 C.F.R. § 402.14(h)(3).

29. Compliance with the procedural provisions of the ESA—identifying the likely effects of the action through the consultation process—is integral to compliance with the substantive requirements of the Act. Under the statutory framework, federal actions that “may affect” a listed species or critical habitat may not proceed unless and until the federal agency ensures, through completion of the consultation process, that the action is not likely to cause

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jeopardy or adverse modification of critical habitat. 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.14, 402.13; *see also* 16 U.S.C. § 1536(d).

30. Consultation must be reinitiated if, among other reasons, "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered," or "[i]f a new species is listed or critical habitat designated that may be affected by the identified action." 50 C.F.R. § 402.16.

31. Even after the procedural requirements of a consultation are complete, the ultimate duty to ensure that an action will not likely jeopardize a listed species or adversely modify its critical habitat lies with the action agency. If the Service finds that a proposed action avoids jeopardy and adverse modification of critical habitat, this substantive duty is fulfilled by implementing that action in accordance with any conditions or requirements established during the consultation process, including any measures necessary to minimize take. If the Service develops an RPA necessary to avoid jeopardy and/or adverse modification of critical habitat, the action agency can most easily fulfill its substantive duty by implementing the RPA and any other measures developed during the consultation process. However, an action agency is technically free to choose another alternative course of action if it can independently ensure that the alternative will avoid jeopardy and adverse modification.

II. THE PORT AND WATERWAYS SAFETY ACT

32. Finding that "navigation and vessel safety and protection of the marine environment are matters of major national importance," and "increased vessel traffic in the Nation's ports and waterways creates substantial hazard to life, property, and the marine environment," 33 U.S.C. §§ 1221(a), (b), Congress passed the Ports and Waterways Safety Act ("PWSA"), *id*. §§ 1221-1232, to, *inter alia*, protect the "marine environment." *Id.* § 1221.

33. The PWSA grants the Coast Guard broad authority to establish and modify routing measures, traffic separation schemes, and other measures as necessary to provide safe

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access routes to vessels proceeding to or from U.S. ports, as well as traversing U.S. waters. 33 U.S.C. §§ 1223; 1224(a).

34. The PWSA states that "advance planning is critical in determining proper and adequate protective measures for the Nation's ports and waterways and the marine environment, with continuing consultation with . . . [*inter alia*] affected users, and the general public, in the development and implementation of such measures." *Id.* § 1221(d). The "marine environment" refers to "waters and fishery resources" under United States jurisdiction, including "any area over which the United States asserts exclusive fishery management authority[,] the seabed and subsoil of the Outer Continental Shelf of the United States, the resources thereof and the waters superjacent thereto." *Id.* § 1222(1). It also includes "the recreational, economic, and scenic values of such waters and resources." *Id.*

35. Through its broad regulatory authority, the Coast Guard can impose a variety of conditions on navigation to account for the specific needs of an area. First, the Coast Guard is authorized to operate and maintain "vessel traffic services" ("VTS"), which consist of "measures for controlling or supervising vessel traffic or for protecting navigation of the marine environment." *Id.* § 1223(a)(1). These measures "may include, but need not be limited to . . . routing systems and fairways," *id.*, and, once established, a VTS "may issue directions to control the movement of vessels in order to minimize the risk of collision between vessels, or damage to property or the environment." 33 C.F.R. § 161.1 (b).

36. Second, the Coast Guard is authorized to "control vessel traffic in areas" which the agency "determines to be hazardous" by "specifying times of entry, movement, or departure;" "establishing vehicle traffic routing schemes;" "establishing vessel size, speed, draft limitations and vessel operating conditions;" or "restricting operations, in any hazardous area . . . ." 33 U.S.C. § 1223(a)(4).

37. Third, the Act provides that the Coast Guard "shall designate necessary fairways

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and traffic separation schemes ('TSSs') for vessels operating in the territorial sea of the United States," "[i]n order to provide safe access routes for the movement of vessel traffic . . ." *Id.* § 1223(c). A TSS is a "routing measure which is aimed at the separation of opposing streams of traffic by appropriate means and by the establishment of traffic lanes." 33 C.F.R. § 167.5 (b).

38. As one component of setting TSSs, the Coast Guard may designate "areas to be avoided," which are areas "within defined limits in which either navigation is particularly hazardous or it is exceptionally important to avoid casualties and which should be avoided by all ships or certain classes of ships." 33 C.F.R. § 167.5 (a). It may also designate a "precautionary area," which is a "routing measure comprising an area within defined limits where ships must navigate with particular caution. . . ." *Id.* § 167.5 (e).

39. The Coast Guard has previously used this authority in establishing and modifying other TSSs in the U.S. to protect threatened or endangered species or other marine natural resources. *See, e.g.*, 75 Fed. Reg. 77,529, 77, 531 (Dec. 13, 2010) (TSS in the Atlantic establishing areas to be avoided). It has also narrowed or readjusted TSSs to avoid areas of biological significance or habitat for whales. *See* TSS for San Francisco and Santa Barbara at http://sanctuaries.noaa.gov/protect/shipstrike/policy.html; http://montereybay.noaa.gov/resourcepro/resmanissues/pdf/140905ccc_shipstrikememo.pdf.

40. Before designating any fairways or new or modified TSSs, the Coast Guard must conduct a Port Access Route Study ("PARS") and consult with all affected parties. *See* 33 U.S.C. §§ 1224(b); 1233(c)(3)(B).

41. The PARS process must be completed "expeditiously," and, once a study is completed, the Coast Guard must promptly issue a notice of proposed rule-making if the PARS recommends the designation of fairways or a new or modified TSS. The Coast Guard can also use a PARS to identify needs and develop other rules, regulations, or recommendations to protect the marine environment.

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42. In implementing each of these regulatory schemes, the PWSA requires that the Coast Guard "take into account all relevant factors concerning navigation and vessel safety [and] protection of the marine environment," including, *inter alia*, "any other potential or actual conflicting activity" and "environmental factors." *Id.* § 1224(a).

43. The Strait of Juan de Fuca and surrounding waters, including Rosario Strait, Georgia Strait, Haro Strait, and Boundary Pass include both U.S. navigable waters and Canadian waters. The U.S. Coast Guard has authority to regulate at least the U.S. waters of these areas. *See, e.g.*, 33 C.F.R. §§ 165.1301; 168.40; 165.1310. Pursuant to a 1979 "Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region," the U.S. and Canadian Coast Guards co-manage day-to-day vessel traffic in portions of these waters. Under the 1979 agreement, a Cooperative Vessel Traffic Service ("CVTS") managed jointly by the United States Coast Guard and the Canadian Coast Guard covers the Strait of Juan de Fuca, Haro Strait, Boundary Pass, Rosario Strait, Admiralty Inlet, Puget Sound, and navigable waters adjacent to these areas. The purpose of the CVTS is to facilitate the safe and efficient transit of large vessel traffic while minimizing the risk of pollution to and from ports and anchorages in either country. *See* 33 U.S.C. § 161.55. The agreement does not affect the right of either nation to take actions against vessels posing safety risks or a threat to the marine environment in its own waters.

III. THE ADMINISTRATIVE PROCEDURE ACT

44. The Administrative Procedure Act ("APA") grants a right of judicial review to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action. . . ." 5 U.S.C. § 702.

45. Under the APA, a court must "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." *Id.* § 706(2)(A). An agency action is "arbitrary and capricious if the agency has relied

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on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

46. Under the APA, a court must also "hold unlawful and set aside" any agency action taken that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

47. The Coast Guard's promulgation of the final rule implementing TSSs in the Salish Sea is an "agency action" subject to judicial review under the APA.

FACTUAL BACKGROUND

I. SOUTHERN RESIDENT KILLER WHALES

48. NMFS listed the Southern Resident Killer Whales ("Southern Residents") as an endangered species in 2005. 70 Fed. Reg. 69,903 (Nov. 18, 2005). This salmon-dependent whale population typically congregates in the inland waters of Puget Sound in the summer, fall, and late spring months but it also ranges all along the coast of Washington, Oregon, and as far south as Monterey Bay, particularly in the winter and spring in search of Chinook salmon, its preferred prey.

49. The major threats that led to the Southern Residents' population decline and subsequent listing under the ESA include the decline of salmon, their primary prey, from habitat destruction and pollution; the presence of toxins in the environment and in their food; noise and vessel impacts; and the risk of an oil spill. *Id.* at 69,908.

50. Today, more than ten years after the listing, the Southern Residents remain in a perilous state and multiple threats to their existence continue to plague the population. While the total number of animals in the population has fluctuated in the 80s for much of the last decade, a

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string of recent deaths has brought the current population down to only 78 whales.

51. This ongoing decline led NMFS in 2016 to announce that the Southern Residents are one of eight "Species in the Spotlight," a designation designed to call special attention to marine species most likely to go extinct in the near future, unless immediate action is taken. As this designation makes clear, the threats that led to the whales' initial listing persist and in some cases, have worsened.

52. In this context, the importance of federal agencies' careful and thorough consideration of potential impacts to the species is of paramount importance. Indeed, in biological opinions prepared for other activities, NMFS has repeatedly concluded that "the loss of a single individual, or the decrease in reproductive capacity of a single individual, is likely to reduce the likelihood of survival and recovery of the species." *See, e.g.*, "Biological Opinion and Conference Opinion on the Long-Term Operations of the Central Valley Project and State Water Project" at 573 (June 4, 2009).[1]

53. Southern Residents are threatened by commercial vessel traffic, including by the risk of large and small oil spills, and from the underwater noise caused by shipping traffic.

54. As NMFS recognized when listing the Southern Residents as endangered, because of their geographic fealty to the inland waters for many months of the year, and their "small population size, combined with their socially cohesive nature, [the whales are] . . . susceptible to catastrophic risks, such as oil spills. . . ." 70 Fed. Reg. at 69,910; *see also id*. at 69,908 (discussing risks from oil spills).

55. The final rule designating critical habitat for Southern Residents includes most of the waters in the Salish Sea, including those around the San Juan Islands, where the South Residents congregate for many of the spring, summer, and fall months. That designation

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[1] *Available at* http://www.westcoast.fisheries.noaa.gov/publications/Central_Valley/Water%20Operations/Operations,%20Criteria%20and%20Plan/nmfs_biological_and_conference_opinion_on_the_long-term_operations_of_the_cvp_and_swp.pdf (visited Apr. 25, 2017)

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specifically identified vessel traffic, oil and gas exploration, and oil spill prevention and response as among the activities that "may affect" critical habitat. 71 Fed. Reg. 69,054, 69,064 (Nov. 29, 2006).

56. In its 2008 Recovery Plan for the Southern Residents, NMFS stressed that that the effects of a major oil spill "are potentially catastrophic to the Southern Resident population," and found that "much of the region inhabited by the Southern Residents remains at risk from major spills because of its heavy volume of shipping traffic and its role as a leading petroleum refining center." NMFS, Recovery Plan for Southern Resident Killer Whales (*Orcinus orca*), at V-15 to V-16 (Jan. 17, 2008). *See also id.* at II-116 (noting that "[t]he possibility of a large spill is considered one of the most important short-term threats to killer whales and other coastal organisms in the northeastern Pacific").

57. The risk of an oil spill is not the only adverse effect posed by oil tankers and other large commercial shipping vessels governed by the Coast Guard's TSSs. Southern Residents depend on sound to navigate, find food, and communicate with each other. Underwater noise—both acute and chronic—can impair these communications, mask echolocation signals, and permanently damage hearing sensitivity among Southern Residents. Southern Residents respond to high noise levels by raising the amplitude, duration, or frequency of calls. This response is often insufficient to compensate for ambient noise levels and can itself be harmful because it carries both energetic and physiological costs; requiring the whales to expend more energy to communicate and locate prey.

58. Noise from large vessels is a primary contributor to high levels of ambient underwater noise in the Southern Residents' habitat. The shipping lanes through the waters of the Salish Sea are some of the busiest on the west coast with large vessels transiting nearly every hour of every day. The collective noise from these vessels have been found to raise background levels by at least an order of magnitude over ecologically significant areas for prolonged periods

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of time. Indeed, evidence suggests that such noise may interfere with up to 97 percent of killer whale communication calls.

59. There are a host of measures available to reduce noise from large vessels, from technological and operational modifications to simply reducing speed.

II. THE COAST GUARD'S FAILURE TO COMPLY WITH THE ESA IN REGULATING COMMERCIAL VESSEL TRAFFIC

60. Pursuant to its broad authority under the PWSA, the Coast Guard has primary responsibility for regulating navigation by establishing and enforcing the "rules of the road" in the Salish Sea, including the Strait of Juan de Fuca, Puget Sound, Haro Strait, Boundary Pass, Rosario Strait, and Georgia Strait. The Coast Guard initiated the first PARS for the coasts of Oregon and Washington, including the entrance to the Strait of Juan de Fuca, in 1979, 44 Fed. Reg. 33,543 (Apr. 16, 1979), and published results from the study in 1981. 46 Fed. Reg. 59,686 (Dec. 7, 1981). The United States and Canada thereafter established the agreement to cooperatively manage vessel traffic in 1979, which included a protocol to develop a TSS at the entrance to and within the Strait of Juan de Fuca. 64 Fed. Reg. 3145, 3146 (Jan. 20, 1999). The Marine Safety Committee of the International Governmental Maritime Consultative Organization (now called "International Maritime Organization") adopted the TSS and the TSS became effective on Jan. 1, 1982. *Id.*

61. After acknowledging an increase in shipping traffic in and around the Strait of Juan de Fuca, the Coast Guard initiated a new PARS process in 1999 for the Strait of Juan de Fuca and adjacent waters, including Admiralty Inlet, Rosario Strait, Haro Strait, Boundary Pass, and the Strait of Georgia, in order to modify the existing TSS. 64 Fed. Reg. 3145. The Coast Guard finalized the PARS on November 20, 2000.

62. In 2002, the Coast Guard published an initial proposed TSS rule for the Strait of Juan de Fuca and its approaches; in Puget Sound and its approaches; and in Haro Strait, Boundary Pass, and the Strait of Georgia. 67 Fed. Reg. 54,981 (Aug. 27, 2002). The Coast

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Guard, together with Canada, submitted joint proposals to the International Maritime Organization for modifications of the TSSs which were implemented in 2005 and 2006. On November 19, 2010, the Coast Guard published an interim rule that codified the existing TSS, 75 Fed. Reg. 70,818 (Nov. 19, 2010) and adopted the final TSS on April 26, 2011. 76 Fed. Reg. 23,191 (April 26, 2011) ("Traffic Separation Schemes: In the Strait of Juan de Fuca and Its Approaches; in Puget Sound and its Approaches; and in Haro Strait, Boundary Pass, and the Strait of Georgia") (codified at 33 C.F.R. §§ 167.1300 through 167.1322).

63. The Coast Guard's adoption of the TSSs regulations routes oil tanker and other large commercial vessel traffic through areas vitally important to Southern Residents, including their core summer critical habitat. *See* 50 C.F.R. § 226.206. The Coast Guard's final regulation adopts TSSs for vessels headed to and from both U.S. and Canadian ports. The TSSs in the Strait of Juan de Fuca and surrounding waters consist of inbound and outbound traffic lanes with separation zones and also includes a number of precautionary areas, including two areas in the Strait of Juan de Fuca and its approaches; three areas in Rosario Strait and its approaches; and five additional areas in Haro Strait, Boundary Pass, and the Strait of Georgia. *See* 33 C.F.R. §§ 167.1300 through 167.1322.

64. Vessel operations, vessel traffic, and oil and gas development activities are among the actions that NMFS identified as federal action that "may affect" Southern Residents when it listed the species. *See* 70 Fed. Reg. at 69,9911. *See also* 71 Fed. Reg. 69,054, 69,064 (Nov. 29, 2006) (identifying federal activities including vessel traffic, oil and gas exploration, and oil spill prevention and response as among those that "may affect" critical habitat).

65. The Coast Guard did not consult with NMFS under section 7 of the ESA, 16 U.S.C. § 1536(a)(2), concerning the effects of the 2011 TSSs on ESA-listed species, including Southern Residents, or any other ESA-listed marine species. The adoption of a TSS is an agency action that triggers the duty to consult with NMFS under section 7 of the ESA, 16 U.S.C. §

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1536(a)(2). *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 925-26 (D.C. Cir. 2008).

66. The Coast Guard has not adopted or implemented any VTS, vessel operating schemes, traffic schemes, fairways, speed limits, designated areas to be avoided, other hazardous areas, or any other measures specifically directed at protecting Southern Residents or other ESA-listed marine species.

67. While the Coast Guard's failure to consult with NMFS regarding the effects of the 2011 TSSs violate the ESA, the risks to listed species from the agency's failure to comply with the law is compounded by the Canadian government's recent approval of Kinder Morgan's application to expand the TransMountain pipeline from the Alberta tar sands oil fields to an oil shipping terminal in Burnaby, British Columbia, a suburb of Vancouver, British Columbia. That project will triple the amount of oil currently shipped from tar sands fields in Alberta to the British Columbia coast to approximately 890,000 barrels per day.

68. Exporting this oil will trigger a seven-fold increase in the number of oil tankers transiting the waters of the Salish Sea, including U.S. waters regulated by the Coast Guard, to and from the marine terminal in Burnaby, British Columbia. These approximately 400 tankers will carry approximately 300,000,000 barrels (over 12.5 billion gallons) of oil through these waters every year.

69. When it last conducted a PARS in 1999-2000, the Coast Guard estimated that approximately 15.1 billion gallons of crude oil, refined products, and bunker fuel oil would be moved through the waters of the Salish Sea in 2000 (with a little over 7 billion gallons of that headed to U.S. refineries in Puget Sound). The Coast Guard estimated an increase to approximately 19.2 billion gallons by 2025, even without considering the impact of the additional volume from the more recently-developed TransMountain pipeline. *See* 67 Fed. Reg. at 54,982.

70. The increase in oil tanker traffic with the expansion of the TransMountain

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pipeline comes with a commensurate increase in oil spill risk in a region which, even without this additional traffic, is already at risk for a major spill. One study estimated that the increased traffic from the Kinder-Morgan pipeline alone would result in a 38 percent increase in potential oil loss in U.S. waters of the Salish Sea. This increased risk underscores the urgent need for the Coast Guard to consult with NMFS over the adequacy of its TSSs and other existing measures to determine whether the Coast Guard must take further steps to safely regulate this amount of dangerous shipping traffic through the heart of the Southern Residents' critical habitat.

71. The risk of oil spills is not the only threat posed by the vessels regulated through the 2011 TSSs: vessel noise and ship strikes also threaten Southern Residents and other ESA-listed marine species. In addition, oil that is lost in bunkering (the transfer of oil or fuel to vessels) or that leaks out in bilge water pollution from discharges of gray water, lubricating oil, engine coolants and other contaminants, as well as air pollution from vessels, is also damaging to ESA-listed marine species.

CLAIM FOR RELIEF

THE COAST GUARD HAS FAILED TO COMPLETE CONSULTATION REGARDING ITS APPROVAL AND IMPLEMENTATION OF ITS TSS IN THE SALISH SEA, AN ACTION WHICH "MAY AFFECT" LISTED SPECIES AND ADVERSELY MODIFY THEIR CRITICAL HABITAT

72. Paragraphs 1 through 71 are hereby realleged as though set out in full.

73. Section 7(a)(2) of the ESA prohibits agency actions that jeopardize the survival of listed species or that destroy or adversely modify their critical habitat. 16 U.S.C. § 1536(a)(2). To assist in complying with this duty, federal agencies, like the Coast Guard, must consult with NMFS before taking an action that "may affect" a listed species or the species' critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

74. The ESA and its implementing regulations broadly define agency action. 50 C.F.R. §§ 402.02, 402.03. The Coast Guard's approval and implementation of TSSs in the Salish Sea constitutes "agency action" under ESA section 7(a)(2). 50 C.F.R. §§ 402.02, 402.03.

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75. Under the ESA, agency actions that "may affect" a listed species or critical habitat may not proceed unless and until the federal agency first ensures, through completion of the consultation process, that the action is not likely to cause jeopardy or adverse modification of critical habitat. 16 U.S.C. § 1536(a), (d); 50 C.F.R. §§ 402.14, 402.13; *see also id.* § 402.02 (adverse modification defined as "direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species").

76. Consultation under section 7 of the ESA is required whenever an agency action "may affect" any listed species or its critical habitat. The threshold for a "may affect" determination is low and is met by "actions that have *any chance of affecting* listed species or critical habitat—even if it is later determined that the actions are 'not likely' to do so." *Karuk Tribe of Cal.*, 681 F.3d at 1027 (emphases added) (finding "[a]ny possible effect, whether beneficial, benign, adverse or of an undetermined character" triggers the requirement) (citations omitted).

77. The Coast Guard's adoption of its 2011 TSSs is an action that "may affect" Southern Residents and their critical habitat. Accordingly, the Coast Guard is required to consult with NMFS to ensure that its TSS regulations will not jeopardize any listed species or adversely modify critical habitat.

78. The Coast Guard's failure to consult with NMFS when adopting its 2011 TSSs violates its section 7 duty to consult under the ESA.

79. Closely tied to this failure to complete consultation, the Coast Guard has also failed to adopt any traffic or routing measures, VTS, vessel operating schemes, traffic schemes, fairways, speed limits, designated areas to be avoided, other hazardous areas or TSSs specifically to protect Southern Residents or other ESA-listed species.

80. As such, the Coast Guard's adoption of the 2011 TSS violates its section 7 duty to ensure that its regulations avoid jeopardizing the continued existence of any endangered species

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or threatened species, and to avoid the destruction or adverse modification of critical habitat of listed species.

81. The Coast Guard has not completed the consultation process and received a valid biological opinion and is regulating shipping traffic through its TSSs in violation of its duties to avoid jeopardy and adverse modification of critical habitat under the ESA.

82. The Coast Guard's approval and implementation of its TSSs in the Salish Sea as well as its continued and ongoing regulation of shipping traffic that "may affect" listed species and/or their critical habitat without first completing consultation with NMFS violates the ESA, 16 U.S.C. § 1536(a)(2), and its implementing regulations, and is arbitrary, capricious, and not in accordance with law, 5 U.S.C. §§ 701-706.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs pray that the Court:

A. Declare that the Coast Guard is in violation of section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), by failing to complete consultation to ensure that its approval and implementation of its TSSs in the Salish Sea as well as its continued and ongoing regulation of shipping traffic is not likely to jeopardize the continued existence of Southern Residents or other ESA-listed marine species and destroy or adversely modify their critical habitat;

B. Enjoin the Coast Guard to comply with the ESA by a date certain and on a schedule set by the Court and to avoid or remediate harm to listed species until such time as consultation is complete and the Coast Guard has implemented the permanent measures necessary to ensure against jeopardy, or adverse modification of critical habitat, and to minimize incidental take;

C. Award Plaintiffs their attorneys' fees and costs in this action pursuant to 16 U.S.C. § 1540(g)(4) and 28 U.S.C. § 2412; and

D. Grant such other and further relief as Plaintiffs may request and as the Court deems just and proper.

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Respectfully submitted this 25th day of April, 2017.

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